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TRADE COMBINATIONS AT COMMON LAW.

THE rule that all contracts in restraint of trade were void, was early established in the English law. The first case in which this principle was announced is said to have been decided in the reign of Henry V.[1] In this case an action for debt was brought on a bond, conditioned that the defendant should not use his art of a dyer's craft within a certain city for six months. Judge Hall declared the bond void, and expressed his indignation at this attempt to restrain trade, by exclaiming: "And, by God, if the plaintiff were here, he should go to prison till he paid a fine to the king." This refusal to recognize the validity of any contract in restraint of trade was for a long time characteristic of the English law; but gradually the rule was relaxed.

The modern application of this rule was very well expressed by Judge Christiancy in the case of Hubbard *vs.* Miller.[2] Dissenting from the doctrine sometimes laid down, that all contracts in restraint of trade are *prima facie* or presumptively void, he said:

> If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid.[3]

Under this rule two interests are to be considered, those of the parties to the contract and those of the public. As to the former, the rule was laid down that no contract which did not benefit both parties to the contract, should be regarded as

[1] See Year Book, 2 Henry V, fol. 5, pl. 26. [2] 27 Mich. 15.

[3] This statement was really nothing but an elaboration of the rule which had long before been laid down in the English courts by Chief Justice Tindal, in the case of Horner *vs.* Neves, 7 Bing. 743.

reasonable; as to the latter, no contract in restraint of trade was to be regarded as lawful which was injurious to the public. As a matter of fact, most of the cases actually decided have turned exclusively on the interests of the parties, and the tendency of the courts has therefore been to relax very greatly the old rule of the common law. This tendency probably reached its culmination in a case decided in 1887, by the New York court of appeals, Diamond Match Co. *vs.* Roeber.[1] Here the court was called upon to construe a contract made by Roeber with the Swift, Courtney & Beecher Co., the grantor of the Diamond Match Co., in which he agreed that he would not within ninety-nine years, except in the capacity of agent or employee of the Swift, Courtney & Beecher Match Co., directly or indirectly engage in the manufacture or sale of friction matches in any part of the United States except Nevada and Montana. The court held the contract to be valid, although practically in general restraint of trade, saying:

> When the restraint is general, but at the same time is coextensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why as between the parties the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint.

But the court of appeals, in making this decision, did not intend to depart from the old rule, so far as the maintenance of that old rule was necessary for the protection of the interest of the public. It said distinctly:

> Covenants of the character of the one now in question operate simply to prevent the covenanter from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition; but the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies; they confer no special or exclusive privilege. If con-

[1] 106 N. Y. 473.

tracts in general restraint of trade where the trade is general are void as tending to monopolies, contracts in partial restraint where the trade is local are subject to the same objection, because they deprive the local community of the services of the covenanter in the particular trade or calling, and prevent his becoming a competitor with the covenantee.

And again:

Combinations between producers to limit production and to enhance prices are or may be unlawful, but they stand on a different footing.

This case has frequently been cited, as indicative of a change in the rule of the common law, and as establishing the proposition that in our present economic conditions the policy of the law is, in order to promote the greatest freedom of contract, not to declare void contracts even in total restraint of trade. But the court of appeals based its decision upon the express ground that the public interest was not involved. While holding valid the particular contract before it, although in general restraint of trade, the court specifically declared that combinations to raise prices stood upon a different footing, and recognized the fact that where the public interest was involved, the rule might well be different. The common law has all along refused, and does now refuse, to recognize the validity of agreements made between individuals for the purpose of raising the prices of commodities, and has stamped any such attempt as a criminal conspiracy.

1. *Agreements aiming to raise prices are invalid.*

That such agreements are invalid has always been the rule of both courts of equity and courts of law. Thus, take the case of Craft *vs.* McConoughy.[1] This was a bill in equity brought for an accounting and distribution of the profits of an alleged partnership based upon a contract to the following effect: Several grain houses were put into the business upon a basis of distributing shares to the signers of the agreement;

[1] 79 Ill. 346, decided in 1875.

each separate firm was to conduct its own business as if there were no partnership in existence. It was to be the duty of a general bookkeeper to make a record of all of the grain bought by each party, to debit him with the amount of money paid for the same, and to credit him with all sales; and at the end of every month each individual account was to be balanced, showing the profit or loss, which amount was to be divided *pro rata*, according to the number of shares held by each party. It was further agreed that prices were to be fixed from time to time, and each party to the agreement was to abide by them. Soon after the agreement was made, one party to it died, and his son demanded an accounting. The court held that the agreement was void, as contrary to public policy, and as being an attempt to foster a monopoly and to raise prices; and notwithstanding the fact that it had been partially executed, refused to require an accounting, saying: "The complainant and the defendants were equally involved in the unlawful combination; a court of equity will assist neither."

A similar and even stronger case, decided in Pennsylvania, is that of Nester *vs.* The Continental Brewing Co.[1] Here an association had been formed in Philadelphia among the brewers, for the purpose of controlling the sale and fixing the price of beer in Philadelphia and in Camden and Camden County, New Jersey. It was shown that the plaintiff had for valuable consideration obtained from a member of the association an assignment of a claim due such member from the association, without knowledge that the claim was based upon an agreement to monopolize the sale of beer. Notwithstanding his *bona fides*, the court refused to aid him, and denied his application for an accounting.

Not only courts of equity, but also courts of law, refuse to aid in the execution of such agreements. Thus, in the case of Chapin *vs.* Brown,[2] the grocers engaged in business in the town of Storm Lake agreed in favor of a third person to quit the business of buying butter for two years, and such

[1] 161 Pa. St. 473, decided in 1894.
[2] 83 Iowa, 156, decided in 1891.

third person agreed to carry on that business exclusively for the same period of time. In pursuance of this agreement, the plaintiffs came to the town and engaged in the business of buying butter; at the commencement of the suit they were so engaged, and had made arrangements to continue the business for the period of two years. The defendant, however, continued in the business of buying butter; and it was alleged that by so doing he had damaged the plaintiffs to the extent of one hundred and fifty dollars, for which judgment was asked. The court refused the application of the plaintiffs, on the ground that the agreement was against public policy, as tending to monopolize the butter trade at Storm Lake, and to destroy competition in that business. This case is particularly interesting because the agreement was as to purchase and not as to sale. It therefore did not result in disadvantage to the consuming public generally, but only in disadvantage to the producers of butter.[1]

A somewhat similar case, More *vs.* Bennett, was decided in January, 1892, by the supreme court of Illinois.[2] Here the stenographers in the city of Chicago had formed an association, of which all the parties to the suit were members. The object of the association was to establish and maintain uniform rates. A schedule had been adopted, and it was alleged that the defendant, contrary to the rules of the association, had cut rates against the other members thereof, whereby the plaintiffs had been damaged. The court refused to pass upon the question whether a contract could be found in such articles of association, and decided that, even if a contract could be found, the agreement was void on account of its attempt to regulate prices. The court refused, therefore, to award damages to the plaintiff. The case is interesting as showing that the courts will apply the same rules to the attempt to regulate the price of labor as to the attempt to regulate the price of commodities.

[1] It is only fair to say that the contract was declared void, not only because it was contrary to public policy, but also because in the opinion of the court it was not based upon a consideration. [2] 140 Ill. 69.

Another good case is that of the Texas Standard Oil Co. *vs.* Adoue, decided in Texas in 1892.[1] This suit was brought to recover guaranteed net prices for all the products of certain mills, and for the costs and expenses of production, in consideration of the strict performance of all covenants in a contract. This contract, it was held by the court, gave the defendant an almost unrestricted field to obtain the raw material for its mills, and the exclusive right to control, free from the competition of the plaintiffs and others, not only the sales and ruling prices of the product of its own mills, but also the entire yield of the mills of the other parties to the contract. The court held that the manifest purpose and natural tendency of this agreement were to prevent competition in too many localities — upon the one hand, to reduce the price of the raw materials; and upon the other, to enhance that of the manufactured product by artificial means, to the disadvantage and detriment of the public. Therefore the complaint was dismissed.[2]

A similar case is Arnott *vs.* The Pittston and Elmira Coal Co.[3] Here the plaintiff's assignor, the Butler Colliery Co., had made an agreement with the defendants that it would not send coal north to any point except to the defendants, the latter agreeing to take from the Butler Co. not exceeding 2000 tons of coal per month. In pursuance of this agreement, the Butler Colliery Co. shipped 2700 tons to The Pittston and Elmira Coal Co., and the plaintiff, to whom it had assigned its claim, brought suit for the price of the coal. The court held that the contract was made by the defendants with the purpose of establishing a monopoly of coal in the city of Elmira, that this purpose was known to the plaintiff's assignor, the Butler Coal Co., that the contract was contrary to public policy, and therefore that suit might not be brought upon it. The court said:

[1] 83 Tex. 650.

[2] This case, like Chapin *vs.* Brown, noticed above, shows that the courts will take notice that the effect of a combination in restraint of trade is to reduce the prices of articles to be purchased, as well as to increase the price of articles to be sold by the combination.

[3] 68 N. Y. 558, decided in 1877.

Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supplies, such arrangements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. . . . The purpose of the vendee was against public policy, and the vendor knew it. This brings us straight to the question whether the vendor delivering goods under such a contract can recover for the price. I think that under the circumstances of the present case, as found by the referee, he cannot. . . . He had a right to dispose of his goods, and (under certain limitations) the vendor of goods may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser. This doctrine is established by authority, and is sufficiently liberal to vendors. But — and this is a very important distinction — if the vendor does anything beyond making the sale to aid the illegal scheme of the vendee, he renders himself *particeps criminis* and cannot recover for the price.

So, also, it has been held that a loan made for the purpose of aiding in a combination to raise the price of a particular article, cannot be recovered. In the case of Raymond *v.* Leavitt,[1] plaintiff had loaned the sum of $10,000 to the defendant for the purpose of controlling the wheat market at Detroit, with a view of forcing up prices. The defendant, who was to give the plaintiff a third of the expected profits, was at all events to repay the $10,000, with or without profits. In rendering its decision, the court said:

The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market, for the express purpose of getting the advantage of dealers and purchasers whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. . . . We shall decline enforcing such contracts. If parties

[1] 46 Mich. 447, decided in 1881.

see fit to invest money in such ventures, they must get it back by some other than legal measures.

Probably the strongest case of all is that of Morris Run Coal Co. *vs.* Barclay Coal Co.[1] This was an action upon an accepted draft of the defendants in favor of the plaintiffs. The draft was made in execution of a contract between five coal companies for a sum found due in the equalization of prices under the contract. Provision was made in the contract for a committee of three to take charge of the business of all of these companies, to decide all questions and to appoint the general sales-agent. Provision was also made for the mining and delivery of coal, and for its sale through this agent, subject, however, to the restriction that each party should at its own cost deliver its proportion of the different kinds of coal in the different markets, at such times and to such parties as the committee should from time to time direct. The committee was authorized to adjust the price of coal in the different markets, and the rates of freight, and also to enter into such an agreement with the anthracite coal companies as should promote the interest of the parties. The companies were allowed to sell their coal themselves, but only to the extent of their proportion, and only at the prices adjusted by the committee. In answer to the claim that this agreement tended to establish a monopoly, the plaintiff replied that the true object of it was to lessen expenses, to improve the quality of the coal and to deliver it in the market in the best order to the consumer. These allegations the court said were immaterial:

> Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal-field; that it is the great source of supply of bituminous coal to the state of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an

[1] 68 Pa. St. 173, decided in 1871.

article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel; and this is accomplished by a combination of all of the companies engaged in this branch of business in the large region where they operate. The combination is wide in scope, general in its influence and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void.

Further commenting upon the agreement, the court said:

The effects produced on the public interest lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit: the combination resorted to by these five companies. Singly, each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others; but here is a combination of all the companies operating in the Blossburg and Barclay mining regions and controlling their entire productions. . . . This combination has a power in its confederative form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. . . . Such a combination is more than a contract; it is an offense. . . . The present case is free of difficulty, the money represented by the bill arising directly upon the contract to be paid by one party to another party to the contract in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it.

While the courts will not enforce an unlawful agreement or give damages for the non execution of an unlawful agreement, it does not by any means follow that they will prevent the execution of an agreement which is in reasonable restraint of trade. A good case upon this point is that of the Bohn Manufacturing Co. *vs.* Hollis.[1] The plaintiff was a manufac-

[1] 54 Minn. 223, decided in 1893.

turer and vendor of lumber and other building material, a large and valuable part of his trade being with retail lumber dealers. The defendant, the Northwestern Lumbermen's Association, was a voluntary association of retail lumber dealers, formed to protect its members against sales by wholesale dealers and manufacturers to contractors and consumers. The method employed by the association was to demand of every wholesale dealer who sold directly to contractors and consumers ten per cent of the amount of such sales, and to notify all the retail dealers to refrain from dealing with such wholesale dealer until the payment was made. The plaintiff in this suit, having sold directly to consumers, was requested to pay the ten per cent to the association, failing which payment the secretary of the association threatened to send to the other retail dealers the notice provided for in the agreement of the association. Plaintiff demanded an injunction to restrain the issuing of these notices. The court refused the injunction; it held that the agreement was not in unreasonable restraint of trade or unlawful, and recognized that it was a general rule of trade in every department that wholesale dealers should refrain from selling at retail within the territory from which their customers obtain their business.

What one man may lawfully do singly [says the court], two or more may lawfully agree to do jointly; the number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful acts of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendant. If the act be unlawful, the combination of many to permit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act which, if done by one individual alone, although unlawful, would not be criminal. Hence the fact that the defendants associated themselves to do the act complained of is wholly immaterial in this case.

A somewhat similar case is that of Cote *vs.* Murphy.[1] In this case, workmen engaged in building trades had combined to advance wages by reducing the hours of labor; and associations of employers in such trades had combined and agreed not to sell materials to contractors who acceded to the demands of the workmen, and to induce other dealers by all lawful means not to furnish such materials. The court held that such associations of employers were not liable in damages for conspiracy to contractors who, by reason of the combination, were not able to procure all the materials they could dispose of.

2. *Agreements aiming to raise prices are criminal.*

The early English and American cases, regarding labor as in the nature of a commodity, held very frequently that combinations among workingmen for the purpose of raising wages were, even if unaccompanied by any violence or other unlawful acts, criminal conspiracies. One of the earliest cases in this country was that of People *vs.* Fisher.[2] In this case, certain journeymen shoemakers had combined for the purpose of fixing the wages of members of the combination. They were indicted under a provision of the New York Revised Statutes which declared that if two or more persons should conspire to commit any act injurious to trade or commerce, they should be deemed guilty of a misdemeanor. This provision is regarded as declaratory of the common law. The court, in its opinion, declared that a combination to raise wages was injurious to trade or commerce, adding:

> It is important to the best interest of society that the price of labor be left to regulate itself, or rather be limited by the demand for it. Combinations and confederacies to enhance or reduce the prices of labor or of any articles of trade or commerce are injurious. They may be oppressive by compelling the public to give more for an article of necessity or of convenience than it is worth, or on the other hand, by compelling the labor of the mechanic for less than its value.

[1] 159 Pa. St. 420, decided in 1894.
[2] 14 Wendell, 9, decided in 1835.

It is only fair to say that the court was influenced in its decision by the fact that the indicted shoemakers left the employment of a master workman, in order to force him to discharge one who had formerly been a member of the shoemakers' association, but who had refused to pay the penalty fixed by the association for violation of the agreement not to work for less than a certain sum. It will be seen, therefore, that in this particular case the conspiracy included not only the combination to raise prices, but also something in the nature of a boycott. The court remarked:

> In the present case an industrious man was driven out of employment by the unlawful measures pursued by the defendants, and an injury done to the community by diminishing the quantity of productive labor and of internal trade. . . . He had a right to work for what he pleased. His employer had a right to employ him for such price as they could agree upon. The interference of the defendants was unlawful; its tendency is not only to individual oppression, but to public inconvenience and embarrassment. I am of the opinion that the offense is indictable.

In commenting upon this general subject of labor combinations, the supreme court of Pennsylvania, in the case of Cote *vs.* Murphy, already referred to, said:

> The fixed theory of courts and legislators . . . was that the price of everything ought to be, and in the absence of combinations, necessarily would be, regulated by supply and demand. The first to deny the justice of this theory and to break away from it was labor; and this was soon followed by . . . legislation . . . relieving workmen of the penalties of what for more than a century had been declared unlawful combinations or conspiracies.[1] Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price determined by supply and demand might or might not be fair wages, often was not, and, as long as workmen were not free by combinations to insist upon their right to fair wages, oppression by capital, or which is the same thing, by their employers,

[1] Thus, in New York it is provided that it shall not be a criminal conspiracy for persons to combine for the purpose of advancing or maintaining wages.— Laws of 1870, c. 19.

followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear: the moment the legislature relieved one and by far the larger number [*sic*] of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular subject.

The logical consequence of this change in the law was, in the opinion of the court, that, after employees had combined to raise wages, any combination made by employers against raising wages was not an unlawful conspiracy, inasmuch as the purpose of the employers was, not to interfere with the price of labor as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price as regulated by the supply.

A perusal of the later decisions upon this subject, sometimes made as a result of a change in the ideas of the judges, sometimes made as a result of specific statutes passed upon the subject, must lead to the conclusion that at the present time a combination of laborers for the purpose of raising wages, if unaccompanied by any unlawful act,—as, for example, a boycott or violence,—is not to be regarded as a criminal conspiracy. One of the latest cases upon the subject is The Longshore Printing Co. *vs.* Howell.[1] In this case the court held that it was not unlawful for a union to make provision in its by-laws for a scale of wages, or for limiting the number of apprentices; nor was it unlawful for several or many employees to agree among themselves to quit their employer, in order by so doing to induce him to confine his employment to certain kinds of labor.[2]

But while the law at the present time is that combinations of laborers to raise wages, when unaccompanied by any unlawful acts, are not criminal conspiracies, it cannot be said that the old common law generally has been thus changed. That is, not-

[1] 26 Oregon, 527, decided in 1894.

[2] The common law was the same in the case of a combination of employers to reduce wages. Such a combination was a criminal conspiracy. Com. *ex rel.* Chew *vs.* Carlisle, Brightley's Report, Pa., 36.

withstanding the change made in favor of labor, it is still a crime to combine for the purpose of raising the price of commodities. One of the latest cases decided upon this point is People *vs.* Sheldon.[1] In this case, certain coal dealers in the city of Lockport entered into an agreement to organize a coal exchange. The object of this exchange was to secure a general supervision and protection of the interests of retail dealers in coal and similar commodities. It was made the duty of members strictly to obey all the provisions of the constitution, by-laws and resolutions of the exchange. Any member guilty of violating any provision of the by-laws, or of conduct unbecoming a member, or of giving short weight or overweight, was liable to forfeit his membership. The agreement further declared that the retail price of coal should as far as practicable be kept uniform; and that no price should be made at any time which should exceed a fair and reasonable advance over wholesale rates, or which should be higher than the current prices at Rochester or Buffalo, figured upon corresponding freight tariffs; and that at no time should the price of coal at retail exceed by more than one dollar the wholesale cost, except by the unanimous vote of all the members of the exchange. A certain member of the exchange was indicted, on the ground that this agreement constituted an unlawful conspiracy to increase the price of coal at retail in the city of Lockport, and that in pursuance of it the defendant and other members of the exchange elected officers and by resolution increased the price of coal seventy-five cents per ton. The indictment was found under section 168 of the Penal Code, which is a reënactment of the provision of the Revised Statutes, making it a misdemeanor for any two or more persons to conspire "to commit an act injurious to the public health, to public morals or to trade or commerce." The trial judge submitted the case to the jury upon the proposition that, if the defendants entered into the organization agreement for the purpose of controlling the price of coal and managing the business of the sale of coal so as to prevent competition in price between the members of the exchange, the

[1] 139 N. Y. 251, decided in 1893.

agreement was illegal; and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect this object, the crime of conspiracy was established.

The court of appeals, in deciding upon the propriety of this charge, said :

> The question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as a matter of fact, result in injury to the public, or to the community in Lockport. The question is: Was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements the design of which was to prevent competition in trade, and have held such agreements to be invalid. . . . The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers; and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business at Lockport except in conformity with the rules of the exchange. . . . The *gravamen* of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade because they are liable to be injuriously used. . . . If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal and justified the conviction of the defendant.

Finally, it has been held that corporations may be guilty of the crime of conspiracy, and that they are so guilty when they

refuse to sell their products to dealers handling the products of rival companies.[1]

3. *"Trust" agreements justify forfeiture of corporate charters.*

The impossibility, under the existing law, of making contracts in restraint of trade which would be enforced by the courts, and the danger that such agreements would be followed by punishment, led to the formation of agreements which took absolutely out of the power of the original owners of a business all control over it. These agreements, commonly known as trust agreements, provided for trustees who could operate a number of different enterprises in accordance with their own ideas of what was proper, and who could thus absolutely prevent competition between the parties to the agreements. Such an agreement usually, but not universally, provided for the formation of a corporation out of a partnership wherever a business had been conducted under the latter form. In organizing the trust the stockholders in these corporations exchanged their stock for trust certificates issued by trustees, elected by the persons in interest. The trustees, it was believed, would thus become the only stockholders known to the law, and would therefore have the power of controlling the operations of the corporations whose stockholders had become parties to the trust agreement. In other words, the attempt was made to prevent competition by means of a federation of corporations.

This method was very commonly employed in this country for almost a quarter of a century without being opposed by the public authorities. In 1888, however, attention was directed to a trust agreement in the state of New York, and the attorney-general decided to bring an action in the nature of a *quo warranto*

[1] People *vs.* Duke *et al.*, *N.Y. Law Journal*, Jan. 23, 1897. It would seem, however, that rebates given on condition that the person receiving the rebate shall deal exclusively with the person giving the rebate are perfectly legal. — Mogul Steamship Co. *vs.* McGregor, II. L. App. Cases, 1892, p. 25; Nat. Distilling Co. *vs.* Cream City Importing Co., 86 Wis. 352; Olmstead *vs.* Distilling and Cattle Feeding Co., 77 Fed. Rep. 265.

to forfeit the charter of a corporation whose stockholders had participated in its formation. The matter was decided in the case of the People *vs.* the North River Sugar Refining Co.,[1] and this decision was followed by the supreme court of Ohio in State *vs.* Standard Oil Co.[2] In the New York case the action of the stockholders, even without any formal action upon the part of the corporation, was held to be corporate action, and to be contrary to public policy; the charter of the corporation itself was therefore forfeited. Judge Finch, who delivered the opinion of the court, said :

I think there may be actual corporate conduct which is not formal corporate action ; and where that conduct is directed or produced by the whole body both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. . . . The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over bound and helpless to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but apparently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That is corporate conduct, though there may be utter absence of directors' resolutions. . . . The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law, and the substantial inquiry always is: What, in a given case, has been that collective action and agency? As between the corporation and those with whom it deals, the manner of its exercise usually is material. But as between it and the state the substantial inquiry is only what that collective action and agency has done, and what it has in fact accomplished; what has seemed to be its effective work; what has been its conduct? It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thoughts, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands

[1] 121 N. Y. 582, decided in 1890.

[2] 49 Ohio St. 137, decided in 1892.

and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs; the punishment is theirs; and both must attend and depend upon their conduct. And when they all act collectively as an aggregate body without the least exception, and so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review and not be defeated by the assumed innocence of a convenient fiction.

In the Ohio case the reasoning on this head was very similar.[1] In both of these cases, however, the judges felt called upon to consider the further question whether the act which had thus taken the form of a corporate act was sufficiently injurious and contrary to public policy to justify the forfeiture of the charter. Here the decisions were somewhat divergent. In New York the court held that the act of which the corporation had been guilty was in excess of its powers, and that the charter, therefore, was forfeited. The combination of sugar refineries was declared to partake of the nature of a partnership of corporations, and hence to be in violation of law. There was in the opinion a *dictum* as to the injurious effects of monopolies upon the public; but the court in terms declined

[1] Judge Marshall said: "The general proposition that a corporation is to be regarded as a legal entity existing separate and apart from the natural persons composing it is not disputed. But that the statement is a mere fiction existing only in idea is well understood and not controverted by any one who pretends to accurate knowledge on the subject. . . . Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored and the question determined whether the act in question, though done by shareholders, that is to say by the persons united in one body, was done simply as individuals and with respect to their individual interests as shareholders, or was done ostensibly as such but, as a matter of fact, to control the corporation and affect the transaction of its business in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so because, the stockholders having a dual capacity and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law fraud would enjoy an immunity awarded to it in no other."

to advance into the wider discussion over monopolies and competition and restraint of trade, and the problems of political economy. . . . Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of the trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several, as they were created, or one under the statute.[1]

In the *dictum* with regard to monopolies there were several very interesting statements, indicative of the opinion of the court as to the public policy of permitting combinations whose purpose or effect is to promote monopolies. The public interest which corporate grants are always assumed to subserve is most unfavorably affected, said Judge Finch,

when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the state, which dominates the range of an entire industry and puts upon the market a capital stock proudly defiant of actual values and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all of these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine and mass their forces in a solid trust or partnership with little added risk to the capital already embarked, without

[1] The statutes here referred to permitted the consolidation of manufacturing corporations, and the court in a previous part of the opinion seemed to intimate that a consolidation under the statute would have been perfectly proper, inasmuch as "the resultant combination would itself be a corporation deriving its existence from the state, owing duties and obligations to the state, and subject to the control and supervision of the state, and not [as in the case presented] an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance."

limit to the magnitude of the aggregation, a tempting and easy road is open to enormous combinations vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the state, by the creation of the artificial persons constituting the elements of the combination and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing; what it should cause and create is quite another.

In the Ohio case the court declared the action of the corporations which formed the trust to be void, as contrary to public policy, on the ground that the attempt was made to form a monopoly. The judge said that the object of the agreement

> was to establish a virtual monopoly of the business of producing petroleum and of manufacturing, refining and dealing in it and all its products throughout the entire country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our state and void. . . . Much has been said in favor of the object of the Standard Oil Trust and what it has accomplished. It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly, and it is the policy of the law to regard not what may, but what usually happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. . . . Monopolies have always been regarded as contrary to the spirit and policy of the law. The objections are stated in "The Case on Monopolies," Darcy *vs.* Allein, Coke, pt. XI, 84 b. They are these: (1) "That the price of the same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases"; (2) "The incident to a monopoly is that after the monopoly is granted, the commodity is not so good and merchantable as it was before, for the patentee, having the sole trade, regards only his private benefit and not the commonwealth"; (3) "It tends to the impoverishment of divers artificers and others who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary." The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers

and a great body are merely employees or servants is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits, or in the profits of production, as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters patent; but the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same, whether created by patent or by an extensive combination among those engaged in similar industries controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.[1]

4. *Are corporations for purposes of monopoly illegal?*

The effect of the foregoing and similar decisions was that any persons who intended to form a combination for the purpose of limiting competition, were obliged to seek a substitute for the trust agreement. As a general thing they effected an organization in the shape of a large corporation, since, as has been shown, the New York court of appeals had appeared to regard this as a legal method of forming a combination.[2] The courts were soon required to decide upon the legality of such action. The first case that came up was that of People *vs.* The Chicago Gas Trust Co.[3] A gas trust company, as it was called, had been formed, in whose certificate of incorporation the purposes of the corporation were stated to be the manufacture of gas and the purchase, holding and selling of stocks in other gas and electric companies in Chicago or elsewhere in Illinois. *Quo warranto*

[1] A similar decision was made by the supreme court of Nebraska in State *vs.* Nebraska Distilling Co., 29 Neb. 700, decided in 1890. See also Mallory *vs.* Hananer Oil Works, 8 S. W. Rep. (Tenn., 1888), where suit was brought against trustees of a trust agreement by a corporation which was a party to such agreement to recover possession of its property. Judgment was given in favor of the plaintiff on the ground that the corporation could not enter into such an agreement, which the court considered to be a partnership of corporations.

[2] *Ante*, p. 230.

[3] 130 Ill. 268, decided in 1889.

was brought against the corporation to obtain judgment of ouster against its use of the franchise to purchase and hold or sell the capital stock of other companies. It was clearly admitted on both sides that the court was not precluded from examining into the legality of the exercise of this franchise by the fact that the certificate of incorporation had been approved and filed with the proper executive officers of the state. The general incorporation act of the state permitted the formation of corporations in the manner provided by it for any lawful purpose. The question which arose was, therefore, whether the corporation in question had been formed for a lawful purpose.

In answering this question the court found that one result of the exercise of this franchise by the Chicago Gas Trust Company would be that it could control the four other companies in Chicago. The control of these four companies, it was thought, would suppress competition among them, and thus build up a virtual monopoly in the manufacture and sale of gas. The court said:

> Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful, as being contrary to public policy.

It therefore held that

> if contracts and grants whose tendency is to create monopolies are void at common law, then where a corporation is organized under a general statute, a provision in the declaration of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void.

Further on in the opinion it is stated:

> To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the state, but is in contravention of the spirit, if not the letter, of the constitution.

The court also cited with approval the following views expressed by the supreme court of Georgia in the case of Central Railroad Co. *vs.* Collins.[1]

> All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulations, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations professing, and in the main truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed as such bodies are from the sure bound to the schemes of individuals, the grave, they are able to add field to field and power to power until they become entirely too strong for that society which is made up of those whose plans are limited by a single life.

For these reasons judgment of ouster was issued against the Chicago Gas Trust Company, as to the exercise of the franchise of purchasing the stocks in other gas companies.

All the cases thus far considered certainly give evidence that the courts of this country regard any combination, whatever form it may take, whose tendency or whose purpose is to form a monopoly, as contrary to public policy and illegal at common law; but none of them, not even the last, distinctly declares unlawful the formation of a corporation whose purpose or whose effect is to promote monopoly. This question it remained for the supreme court of Illinois to consider in the case of the Distilling & Cattle Feeding Co. *vs.* The People.[2]

In view of the decisions which the courts were almost universally rendering as to the illegality of trust agreements, the holders of trust certificates in the Distillers & Cattle Feeders' Trust, commonly called The Whiskey Trust, had in February, 1890, adopted a recommendation of the trustees to form a corporation with a capital stock of $35,000,000. The corporation was thereafter organized. The trustees of the

[1] 40 Ga. 582, decided in 1869.
[2] 156 Ill. 448, decided in 1895.

former trust subscribed for all the stock of the new corporation and elected themselves its first directors. They, or so many of them as were necessary to constitute a majority of the directors of each of the corporations composing the trust, also ordered a conveyance of all the property which those corporations held, to the newly formed corporation; and as directors of these corporations, they executed to the Distilling & Cattle Feeding Company a transfer of all of the property of these corporations, and surrendered to the holders of the trust certificates the shares of stock in the newly formed corporation in return for the trust certificates. The new corporation subsequently purchased the property and business of other corporations not parties to the former trust agreement. Suit was brought against the new corporation, and judgment of ouster from its franchise was demanded, on the ground that it had created a monopoly in the manufacture and output of distillery products, and secured such control over the consumers thereof as to destroy all competition in the manufacture and sale of such products throughout the United States.

The court, in rendering its opinion, said:

There can be no doubt, we think, that the Distillers' & Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal. [The new corporation succeeded] to the trust, and its operations are to be carried on in the same way, for the same purposes and by the same agencies as before. The trust then being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country — over production and prices — and the virtual monopoly formerly held by the trust are in no degree changed or relaxed, but the method and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

In answer to the objection that the defendant corporation by its charter was authorized to purchase and own distillery property, and that there was no limit placed upon the amount of property which it might thus acquire, the court said:

It should be remembered that grants of powers in corporate charters are to be construed strictly, and that what is not clearly given is by implication denied. The defendant is authorized to own such property as is necessary to carry on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power by its charter to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. All such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the state by *quo warranto*. We are of the opinion that upon the facts shown by the information, the judgment of ouster is clearly warranted.

A case involving somewhat similar questions is that of The People *vs.* The Milk Exchange, decided by the New York court of appeals.[1] The Milk Exchange had ninety-odd stockholders, a large majority of whom were milk dealers in the city of New York, or creamery or milk-commission men doing business in that vicinity. At the first meeting of the exchange after its incorporation, the following among other by-laws was adopted: "The board of directors shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of this company." Acting upon this by-law, the board of directors from time to time fixed the price of milk to be paid by dealers, and the prices so fixed largely controlled the market in and about the city of New York.

[1] 145 N. Y. 267, decided in 1895.

The court, in deciding the case, declared its conviction that there was a combination on the part of milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk; and that a case was presented in which the jury might have found that the combination referred to was inimical to trade and commerce, and therefore unlawful. Accordingly, the charter was declared forfeited.

> It may be claimed [the court said] that the purpose of the combination was to reduce the price of milk and, it being an article of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers.

This case is interesting as showing that the courts will take cognizance of an attempt through a combination in the form of a corporation to lower the price of commodities to the detriment of the producer as well as of an attempt to enhance the price at the expense of the consumer.

5. *Attitude of the United States Supreme Court.*

Notwithstanding the decisions thus far considered, persons who desired to form a trade combination were able to do so with impunity, on account of the fact that if their organization was declared illegal in one state, they could organize under the laws of another, provided the public opinion in the latter was not opposed to trade combinations. An attempt was therefore made in what is known as the Anti-Trust Law, passed by Congress in 1890, to give the national government the power, in addition to that which the states already possessed, to suppress trade combinations. But it was recognized by the promoters of this bill that Congress had no jurisdiction of specifically state industry and commerce. The act was, therefore, worded as follows: "Every contract, combination in the form of trust

or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal." Every one participating in such a contract or engaging in such a combination was declared to be guilty of a misdemeanor, and made liable to severe punishment. It was provided that the circuit courts of the United States should have jurisdiction to restrain violations of the act, and that it should be the duty of the law officers of the United States to institute the proper proceedings. A suit was begun in Pennsylvania against certain sugar-refining corporations which had been absorbed by the American Sugar Refining Company. Evidence was taken before Judge Butler, of the circuit court, who said in his opinion: "The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country." The opinion also showed that, after the purchase of these refineries by the American Sugar Refining Company, the latter corporation had obtained control of all refineries in the United States except one in Boston, whose output was about two per cent of the sugar refined in this country.

This case went on appeal to the supreme court of the United States.[1] Here, on the state of facts presented by Judge Butler, the court held that the act of 1890 was framed in the light of well-settled principles; that

> Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property, or to regulate or prescribe the price or prices at which such property or the products thereof should be sold, or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. . . . The contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar-refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. . . . It is true that the bill alleged that the products of these refineries were sold and distributed among the several states,

[1] United States *vs.* E. C. Knight Co., 156 U. S. 1.

and that all the companies were engaged in trade or commerce with the several states and with foreign nations. But this was no more than to say that trade and commerce served manufacture to fulfill its functions. . . . It does not follow that an attempt to monopolize or the actual monopoly of the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though in order to dispose of the product the instrumentality of commerce was necessarily invoked. . . . There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce; and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle the claimants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce.

It will be noticed that this decision was based upon three grounds: (1) that the proper remedy was not invoked, or at any rate was not invoked at the proper time; (2) that the combination did not disclose an attempt to monopolize; (3) that, even if it did so, it was not a combination in restraint of interstate or foreign commerce.

As to the first of these grounds, it may be said that the bill which was before the court asked that an injunction might issue to prevent and restrain the said defendants from further and continued violations of the act of Congress. This was in addition to the demand that the agreements between the defendants be cancelled and that the shares of stock transferred in performance of the contracts be restored to their original owners.[1]

[1] Judge Harlan, in his dissenting opinion, said on this point: "While a decree annulling the contracts under which the combination in question was formed may not in view of the facts disclosed be effectual to accomplish the object of the act of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the states and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed or by which it was created."

As to the second ground of the decision, the trial judge found, as has been stated, that the object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country. Moreover, the state courts, in the decisions heretofore cited, have declared that they will go back of any alleged purpose of an agreement or of a certificate of incorporation and will inquire what is its real purpose and effect; and that if the latter are to establish a monopoly unreasonably limiting competition, they will declare the agreement void.

But while these first two considerations undoubtedly influenced the supreme court somewhat, the main ground upon which the decision was based was that the manufacture and sale of sugar were not interstate or foreign commerce. In order to reach this decision, the court laid little stress upon the purpose to monopolize the sale. The sale of sugar was declared to be merely an incident to the manufacture. As the court said, "trade and commerce serve manufacture to fulfill its functions." Laying the weight which they did upon the manufacture, they considered that they were bound by the case of Kidd *vs.* Pearson.[1] Here the

question was discussed whether the right of a state to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made; and it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the state and belonged to commerce, and that therefore the prohibitory act was not in conflict with the constitutional provision giving the right to regulate interstate commerce to Congress.

Another case which seems to have influenced the court was that of Coe *vs.* Erroll.[2] Here the question was "whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the state of Maine were liable to be taxed like other property in the state of New Hampshire"; and it was held that they were liable to

[1] 128 U. S. 1. [2] 116 U. S. 517.

taxation just as much as any other property in the state, and that the owner's intention and his partial preparation to ship them out of the state would not exempt them from taxation as articles of interstate commerce.

Judge Harlan, in a dissenting opinion, pointed out, however, that, under previous decisions of the supreme court, interstate commerce embraced something more than the mere physical transportation of articles of property and the vehicles or vessels by which such transportation was effected. He referred in particular to the case of Mobile County *vs.* Kimball,[1] where it was said that commerce with foreign countries and among the states, strictly considered, consists "in intercourse and traffic, including in these terms navigation and transportation and transit of persons or property, as well as the *purchase, sale and exchange* of commodities." Judge Harlan did not consider that these early statements and decisions had been modified by either of the cases referred to in the majority's opinion. As regards the question of monopoly, he said:

> A combination such as that organized under the name of the American Sugar Refining Company has been uniformly held by the courts of the states to be against public policy and illegal because of its necessary tendency to impose improper restraints upon trade.

And further:

> The object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object is disclosed upon the very face of the transactions described in the bill, and it is proved — indeed conceded — that that object has been accomplished to the extent that the American Sugar Refining Company now controls 98 per cent of all the sugar-refining business in the country, and therefore controls the price of that article everywhere. Now, the mere existence of a combination having such an object and possessing such extraordinary power is itself under settled principles of law — there being no adjudged case to the contrary in this country — a direct restraint of trade in the

[1] 102 U. S. 691.

article for the control of the sales of which in this country that combination was organized. And that restraint is felt in all the states for the reason known to all, that the article in question goes, was intended to go and must always go into commerce among the several states and into the homes of people in every condition of life.

Finally, Judge Harlan argued for the public policy of the Anti-Trust Law in the following language:

> We have before us the case of a combination which absolutely controls, or may at its discretion control, the price of all refined sugar in this country. Suppose another combination organized for private gain and to control prices should obtain possession of all the large flour mills in the United States; another of all the grain elevators; another of all the oil territory; another of all the salt-producing regions; another of all the cotton-mills; and another of all the great establishments for slaughtering animals and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power — one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?

The decision of the United States supreme court, holding that the manufacture and sale of commodities were not, as not being objects of interstate commerce, subject to the regulation of Congress, was therefore not reached without protest; but the court was so nearly unanimous in its decision as to justify the belief that the decision itself will not be reversed in the immediate future.[1] The experiences of the states and the arguments advanced by Judge Harlan in his dissenting opinion would lead also to the belief that the regulation of these trade combinations by the states is practically impossible. Any attempt at efficient regulation must come from the national government.

In view of the fact that great insistence was laid in the last presidential campaign upon the necessity of some efficient regulation of combinations in restraint of trade, it may be well to summarize the views that the courts have expressed as to the

[1] The opinion of the majority in the recent case of the Trans-Missouri Freight Association seems, however, to render the future tendency somewhat uncertain.

impolicy of permitting these combinations to exist and of recognizing or enforcing in any way contracts for executing their purposes.

The reasons given by the courts for their attitude may be classified under three heads — economic, social and political. The economic reasons are two in number. In the first place, it is believed by the courts that a combination in restraint of trade and tending to promote a monopoly will result either in the sale of a depreciated article to the public, or in an enhancement of the price of the article which is so controlled. This was the important economic reason at the basis of the decision in the time of Queen Elizabeth, relative to monopolies granted by the crown. This reason has had so much weight with the courts that they have refused to investigate the question whether such has been the effect of a combination. They have simply declared that the possession of monopoly powers by any combination must inevitably result in an enhancement of price or in a depreciation in the quality of the article sold. Their reasoning here, it will be noticed, is distinctly *a priori;* and so long as they adhere to this principle, it will be impossible to prove by reference to actual facts whether it is based upon the truth or not. The second economic argument advanced by the courts in support of their policy is that the fixing by any combination of the price of raw materials injures the producer of the raw material, and will ultimately result in disadvantage to the consumer.

The social argument against combinations also dates from the time of Elizabeth. A monopoly, the court said,

> tends to the impoverishment of divers artificers and others who before by the labor of their hands in their art or trade have maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary.

In the form in which it is put, this argument would seem to rest on a misapprehension of the conditions caused by monopolies; and if applied in as broad a way as it is stated in this case, it would be available against the introduction of all labor-saving machinery. In the Ohio case of the State *vs.* The Standard Oil

Co., already referred to, this argument was somewhat modified. The court took the ground, not so much that the formation of the combination throws great numbers of individuals out of employment, as that the development of monopolies transforms great numbers of persons formerly independent into employees or servants. This argument, though treated by the Ohio court as a development of the view of the English court in the case of monopolies, is really quite different in character. A further argument of a social character is to be found in the opinion of Judge Finch in the Sugar Trust case. He based the right of the state to limit the activity of corporations, as distinct from that of individuals, on the ground that a direct grant of corporate powers would, if these powers were not limited, aid in the aggregation of wealth in a few hands. He did not desire to limit the right of individual action, but merely claimed that when specific powers which can only exist as a result of the grant of the state are exercised by individuals, they become rightly subject to regulation in the interest of the state as a whole. It is one thing, said he, for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen; but it is quite another thing for the state positively to promote the aggregation of capital by creating artificial persons such as corporations, without limiting their powers.

The political reason advanced by the courts for their position with regard to trade combinations is perhaps as well stated as anywhere by the supreme court of Georgia. Here it is pointed out that all large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. In England it was found necessary to limit the amount of property which even religious corporations might possess, notwithstanding the fact that they, far more than trading bodies, might be expected to exercise their powers for the general good. Given the privilege of legal immortality, corporations, it was held, are apt to "become entirely too strong for that society which is made up of those whose plans are limited by a single life."

Such are the rules of law in the United States with regard to the legality of trade combinations, and such are the reasons which the courts have advanced for the adoption of these rules. If these reasons are not sound, if the conditions of society are not what they were when these rules were adopted and these reasons were first advanced, it would be well that the rules of law be changed. Changes may be made by legislation, as has very generally been done in the case of labor combinations. If, on the other hand, these reasons are now sound and the rules of law based thereon are at the present time in accordance with public policy, some method ought to be provided for their efficient enforcement. This, it has been pointed out, can in the cases of the largest combinations now in existence be done only through the modification of the present rule of the United States supreme court with regard to national regulation of monopolies; or, in case the supreme court shall not see fit to modify its rules, by the adoption of a constitutional provision giving the Congress of the United States the necessary powers.

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